

(20)

JUN 7 1944  
CHARLES ELSON, CLERK

# Supreme Court of the United States

OCTOBER TERM, 1943.

(No. 1035)

138

GRAYBAR ELECTRIC COMPANY, INC.,

*Petitioner,*

*against*

NEW AMSTERDAM CASUALTY COMPANY,

*Respondent.*

---

---

**PETITION FOR WRIT OF CERTIORARI TO THE COURT  
OF APPEALS OF THE STATE OF NEW YORK,  
AND BRIEF IN SUPPORT THEREOF.**

---

---

GRAYBAR ELECTRIC COMPANY, INC.,

*Petitioner.*

BREED, ABBOTT & MORGAN,

*Attorneys for Petitioner.*

DANA T. ACKERLY,

WILLIAM L. HANAWAY,

STODDARD B. COLBY,

GEORGE W. MORGAN, JR.,

*Of Counsel.*



## INDEX.

---

	PAGE
PETITION	
Summary Statement of Matters Involved.....	2
Proceedings Taken in the Court of Appeals.....	4
Statutes Involved .....	7
Reasons Relied on for Allowance of Writ.....	8

### BRIEF IN SUPPORT OF PETITION

POINT I—The issue awaiting this Court's solution is of public importance	10
---	----

Shall a surety company which derives a profit from the bonding of a municipality's obligations be permitted to repudiate its bond on the ground that the provisions of a local State statute of limitations have not been complied with when the bonded obligations of its principal have acquired national scope and character: because the municipality has obtained for the project in which the obligations were incurred the financial assistance of the National Government, and because the municipality has sought and obtained for that public project the material resources of national private enterprise?

The decision of this Court in the *Southeastern Underwriters Association* case (reported in the press of June 6, 1944) constitutes a further ground for the granting of this petition.

POINT II—A real confusion has been produced by these two decisions of the Tennessee Court and by the New York Court's interpretation of the Tennessee Law	14
---	----

Doubts thus created may have disastrous national consequences unless this Court will entertain the writ and thereby undertake by its decision to harmonize these conflicting holdings and dissipate the business uncertainty which they produce.

POINT III—The Writ prayed for should be granted	19
APPENDIX A Performance bond	20
APPENDIX B Michie's Tennessee Code	24
APPENDIX C Opinion of Special Term, Supreme Court, New York County	27
APPENDIX D Opinion of the Supreme Court for the Eastern Division, State of Tennessee, <i>City of Knoxville v. Melvin F. Burgess, Inc., et al.</i>	28
APPENDIX E Opinion, Court of Appeals of the State of New York	37
APPENDIX F Opinion of the Supreme Court for the Middle Division of the State of Tennessee, <i>Ben M. Hogan v. Walsh &amp; Wells, Incorporated, et al.</i>	41

## TABLE OF CASES CITED.

	PAGE
<i>City of Knoxville v. Burgess, Inc., et al.</i> , 175 S. W. (2d) 548 .....	4, 5, 11, 12, 14, 15
<i>Clark Plastering Company v. Seaboard Surety Company</i> , 259 N. Y. 424, (p. 429).....	18
<i>Edwards v. California</i> , 314 U. S. 160.....	13
<i>Great Northern Ry. v. Sunburst Oil &amp; Refining Co.</i> , 287 U. S. 358, (p. 367).....	7
<i>Gutkind v. Lueders &amp; Co.</i> , 267 N. Y. 320.....	18
<i>Hansberry v. Lee</i> , 311 U. S. 32.....	8
<i>Ben M. Hogan v. Walsh &amp; Wells Incorporated</i> , 177 S. W. (2d) 835, (p. 836).....	11
<i>International Steel &amp; Iron Co. v. National Surety Co.</i> , 297 U. S. 657.....	17
<i>Clifford F. MacEvoy, etc., Petitioners v. U. S. of A. etc.</i> , 88 L. Ed. 795.....	16
<i>Magnolia Petroleum Co. v. Hunt</i> , 320 U. S. 430, (pp. 436, 437).....	17
<i>Mid-State Horticultural Co. Inc. v. Pennsylvania Railroad Co.</i> , 320 U. S. 356.....	16
<i>Milk Control Board v. Eisenberg Co.</i> , 306 U. S. 346....	13
<i>Ruehs v. Trader's Fire Ins. Co.</i> , 111 Tenn. 405; 78 S. W. 85.....	17
<i>Sharrow v. Inland Lines, Ltd.</i> , 214 N. Y. 101.....	18
<i>Southeastern Underwriters Association</i> , not officially reported .....	8, 10
<i>Standard Oil Co. of La. v. Jamison Bros. Inc.</i> 166 Tenn. 53; 59 S. W. (2d) 522.....	17

## TABLE OF STATUTES CITED.

<i>Judicial Code</i> , §237B, Title 28 U. S. C. A. 344 (b).....	7
<i>Tennessee Code, 1938</i> , §7955-9 (Appendix B).....	7, 24



# Supreme Court of the United States

OCTOBER TERM 1943.

(No. ....)

GRAYBAR ELECTRIC COMPANY, INC.,  
Petitioner,

*against*

NEW AMSTERDAM CASUALTY COMPANY,  
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

The petition of Graybar Electric Company, Inc., a Corporation organized under the laws of the State of New York, respectfully shows:

Your petitioner seeks review of a determination of the Court of Appeals of the State of New York on March 10, 1944 (292 N. Y. 246), reversing a judgment of the Appellate Division of the Supreme Court, First Judicial Department of that State in favor of petitioner, as plaintiff, against New Amsterdam Casualty Company, as defendant. The latter judgment affirmed a judgment of the Special Term, New York County, striking out the answer of the defendant and directing summary judgment in favor of the plaintiff (petitioner), in the sum of \$39,910.58.

The Court of Appeals remitted the record to the Supreme Court of the State of New York, County of New York, on March 10, 1944; this latter court, on March 16, 1944, entered a judgment making the determination of the Court of Appeals its judgment. Judgment of reversal was entered in the Office of the Clerk of the Supreme Court for the County of New York on the 30th day of March, 1944.

### **Summary Statement of Matters Involved.**

#### **A.**

#### **The Bond in Suit.**

Petitioner, a materialman, commenced an action in the Supreme Court of the State of New York in 1941, against the respondent upon a performance bond (Appendix A) given by respondent in connection with the construction, partly through United States Government monies, of a Rural Electrification Public Works Project for the City of Knoxville, Tennessee.

The bond was written on a form required by the Rural Electrification Administration for all work done anywhere in the U. S. and ran in favor of the United States Government, the City of Knoxville and was, by its express terms,

“made for the benefit of all persons, firms and corporations, who or which may furnish any materials or perform any labor for or on account of the construction to be performed, \* \* \* and they and each of them are hereby made obligees hereunder with the same force and effect as if their names were written herein as such and they and each of them *may sue hereon.*”



**B.****The Action.**

The petitioner furnished materials in accordance with the terms of a contract covered by the aforesaid bond and upon the failure of its consignee to pay, brought suit upon such bond as a common law contract voluntarily entered into for the amount due, aggregating \$36,608.90, together with interest thereon.

**C.****The Defenses.**

There was no question raised about the relationship of petitioner to the bond nor could there be but the respondent interposed as a defense to the suit certain sections of the Tennessee Code (copies of which are hereto attached as Appendix B), asserting that said sections of the Tennessee law *not referred to in the bond at any place* were applicable and that irrespective of the actual terms of the bond which were much broader and more liberal than the Tennessee statutory bond, the right of the petitioner and the duties of the respondent had to be carved down to fit the requirements of the Tennessee law, which merely set up for the protection of workingmen and materialmen certain minimum requirements of bonds furnished in connection with public works.

**D.****Opinion of the New York Supreme Court.**

Since there was thought to be no issue of fact petitioner moved for summary judgment which motion was granted and a judgment in its favor entered by the Clerk of the Supreme Court for the County of New York on March 13,

1942, the Court holding that “. . . The bond followed the form prescribed by the United States Government in P.W.A. projects. The bond contained no reference to Tennessee statutes nor to the short statute of limitations therein provided. . . . It is a common law bond not given pursuant to any Tennessee statute and so construed the first three defenses must be stricken out. . . .” A copy of the opinion of the Supreme Court of the State of New York is hereto annexed as Appendix C. The Court held that the Tennessee Statutes were inapplicable since the right of action arose out of the contract between the parties and not out of the Statute.

#### **E.**

#### **Affirmance by the Appellate Division of the Supreme Court of the State of New York.**

Upon appeal by respondent to the Appellate Division of the Supreme Court, First Department, the judgment in favor of the petitioner was unanimously affirmed without opinion.

#### **F.**

#### **Proceedings Taken in the Court of Appeals.**

Thereafter, respondent sought for and obtained leave to appeal to the Court of Appeals of the State of New York.

Pending the determination of such appeal, a decision was rendered by the highest Court of Tennessee (*City of Knoxville v. Burgess, Inc., et al.*, 175 S. W. (2nd) 548), adverse to the claim of this petitioner. That decision had a direct relationship to the New York case since it arose out of the same default and the same bond and respondent in reliance thereon urged the New York Court of Appeals to apply the Full Faith and Credit Clause and thereby injected a Federal question into the litigation.

Respondent asserted that by reason of the decision of the Supreme Court of Tennessee in *City of Knoxville v. Burgess, Inc., et al.*, referred to above (a copy of which is hereto annexed, marked Appendix D) "a Federal question was and is involved, and that the refusal of the New York Court of Appeals to apply the Tennessee decision would be violative of the Full Faith and Credit Clause and the Due Process Clause of the Constitution of the United States". This had also been raised by respondent in the brief on the appeal before the decision in the *Burgess* case was handed down.

The Tennessee Court in the decision in the *Burgess* case held that it was a condition precedent to a suit in Tennessee on any performance bond irrespective of its own free terms that a notice of claim be given and that a short Statute of Limitations of that State be observed.

The Supreme Court of Tennessee, however, remanded the case to try the issue of fact as to "possible equities by way of waiver or estoppel in favor of Aluminum Company (one of the parties to that suit) which called for an answer by the Surety and development of all the facts". In its order remanding the case, the Court characterized the local Tennessee Statute as a Statute of Limitations.

### G.

#### **Opinion of the Court of Appeals of the State of New York.**

On March 10, 1944, the Court of Appeals rendered an opinion (a copy of which is annexed as Appendix E). Pursuant to such opinion, the judgments below were reversed and judgment entered in favor of respondent dismissing petitioner's complaint.

The New York Court of Appeals specifically recognized the *Burgess* case and applied the Full Faith and Credit

Clause and in addition held that the Tennessee Court had determined that the provisions of the Tennessee law did not affect the remedy alone, but were limitations upon the obligation itself and constituted conditions precedent to a suit on the bond—all this notwithstanding that the bond was a voluntary agreement between the parties that fixed their rights and obligations unconditioned by or unrelated to any Statute of Tennessee.

#### H.

##### **Motion for Reargument in Court of Appeals.**

Petitioner moved for a reargument of the appeal in the Court of Appeals on April 3, 1944. This was denied ten days later.

The grounds of the motion were that the Court of Appeals had overlooked the fact that in remanding the case for the purpose of trying the issue of waiver and estoppel, the Tennessee Court had necessarily determined that the provisions of the Tennessee law did not constitute conditions precedent to the right of action which could not be waived but were rules of procedure only.

Petitioner's motion for reargument was likewise based upon the Constitutional ground that the Court of Appeals of the State of New York had erroneously accorded extra-territorial effect and full faith and credit to the judgment of the Tennessee Court in violation of the petitioner's Constitutional rights.

As a result of the Court of Appeals' action, petitioner urged that it had been deprived of due process and that the obligation of its contract with the respondent had been impaired in violation of petitioner's Constitutional privileges.

No reason existed for sooner raising the Constitutional questions, both because the respondent had itself already formally injected that question and because no reason had existed for anticipating the action of the New York Court of Appeals.

In any event, the New York Court of Appeals decision supplies "a new and unexpected basis for a claim by the defeated party of the denial of a federal right" (*Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, p. 367) and justifies the present application to this Court for a writ of certiorari under its ruling in the case just cited.

## **J.**

### **Jurisdiction of this Court.**

The order and judgment of the Court of Appeals of the State of New York was made and entered the 10th day of March, 1944, and said order and judgment was made the order and judgment of the Supreme Court of the State of New York for the County of New York on the 16th day of March, 1944. The Court of Appeals of the State of New York is the Court of last resort and the highest Court of that State. Said orders and judgment are final.

The Jurisdiction of this Court rests upon Section 237(b), Judicial Code (28 U. S. C. A. 344(b)).

## **K.**

### **Statutes Involved.**

The primary statute involved is Tennessee Code, 1938, Sections 7955-9 (Appendix B).

## L.

**Reasons Relied on for Allowance of the Writ.**

A Federal question of substance, not heretofore determined by this Court, was decided by the Court of Appeals of the State of New York in favor of the respondent because the New York Court held that the provisions of the Tennessee Code were applicable to the action brought in the State of New York by the petitioner, a resident of the State of New York, against the respondent, likewise a resident of the State of New York.

The necessary result of the decision of the Court of Appeals of the State of New York is to give extraterritorial effect to these provisions of the Tennessee Statute and to accord to them (erroneously, the petitioner respectfully asserts) full faith and credit under the Constitution of the United States in such a way as to deprive petitioner of due process of law and to impair the obligation of the contract between the respondent and the petitioner upon which the suit was brought.

Reasons less strong than these were held by this Court in *Hansberry v. Lee*, 311 U. S. 32, to justify the writ.

The decision of this Court in the *Southeastern Underwriters Association* case (reported in the press of June 6, 1944), constitutes a further ground for the granting of this petition.

WHEREFORE, petitioner respectfully prays that a writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the State of New York commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and

proceedings herein; and that the determination of such Court and the order and judgment thereon be reversed by this Honorable Court and that the petitioner have such other and further relief in the premises as to this Honorable Court may seem just.

Dated: June 6, 1944.

GRAYBAR ELECTRIC COMPANY INC.,  
Petitioner,

BREED, ABBOTT & MORGAN,  
Attorneys for Petitioner.

DANA T. ACKERLY,  
WILLIAM L. HANAWAY,  
STODDARD B. COLBY,  
GEORGE W. MORGAN, JR.,  
Of Counsel.